

No. 14546

United States
Court of Appeals
for the Ninth Circuit.

OTTO K. OLESEN, Individually and as Postmaster of the City of Los Angeles, State of California,

Appellant,

vs.

V. E. STANARD, Individually and d/b/a MALE MERCHANDISE MART,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

FILED

JAN 6 1955

PAUL P. O'BRIEN,

CLERK



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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | PAGE |
|---|------|
| Affidavit of Stanley Fleishman..... | 54 |
| Certificate of Clerk..... | 69 |
| Complaint | 3 |
| Ex. A—Initial Decision of Hearing Examiner | 11 |
| Exhibits Attached to the Reply to Order to Show Cause: | |
| A—Order No. 55656, Decision of the Deputy Postmaster General on Appeal, Initial Decision of Hearing Examiner, Solicitor's Reply to Respondent's Brief on Appeal and Respondent's Reply Brief on Appeal..... | 24 |
| B—Affidavit of William C. O'Brien..... | 41 |
| C—Affidavit of Ralph E. Stapenhorst..... | 49 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal..... | 66 |
| Order Filed July 1, 1954..... | 22 |
| Order Granting Preliminary Injunction..... | 64 |

INDEX

PAGE

Order for Judgment..... 57

Order to Show Cause..... 20

Order to Stay Order Granting Preliminary In-
junction Pending Appeal..... 68

Statement of Points on Which Appellant In-
tends to Rely on Appeal..... 71

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District Court of the United States in and for the
Southern District of California, Central Division

No. 16866 PH

V. E. STANARD, Individually and d/b/a MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, and DOE I
Through DOE X,

Defendants.

COMPLAINT FOR INJUNCTION
AND DECLARATORY RELIEF

Comes Now the Plaintiff and Complains of Defendants and Each of Them and for First Cause of Action Alleges:

I.

That this action arises under 39 United States Code, Sections 255 and 259A; 28 United States Code, Sections 2201 and 2202; 5 United States Code, Sections 1001, et seq., and Articles I, IV, V, VI, VII and VIII of Amendments to the Constitution of the United States.

II.

That at all times herein mentioned defendant, Otto K. Olesen, was and is the duly appointed, qualified and acting Postmaster of the City of Los Angeles, State of California. [2*] That in his ca-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

capacity as Postmaster he is charged with the duties of administrating and managing the United States Post Office in and for said City, and is in charge of and responsible for the receipt and distribution of material sent through the United States mails for delivery in and from said City.

III.

That the defendants, Doe I through Doe X, are sued herein under a fictitious name for the reason that their true names and capacities are unknown to plaintiff at this time.

IV.

That plaintiff, V. E. Stanard, has heretofore been engaged in the business of distributing and selling through the mail certain publications, pin-up pictures and novelties under the firm name and style of Male Merchandise Mart. That plaintiff has duly published and recorded with the office of the County Clerk of the County of Los Angeles, State of California, a Certificate of fictitious firm name in accordance with the provisions Section 2466 of the Civil Code of the State of California.

V.

That on March 1, 1954, the Solicitor for the Post Office Department issued a complaint against plaintiff charging that she was carrying on, by means of the Post Office, a scheme for obtaining money for articles of obscene character.

VI.

Plaintiff answered the complaint and denied the charge; a hearing was held in Washington; pro-

posed findings of fact and conclusions of law were submitted by the plaintiff and the Solicitor of the Post Office Department.

VII.

On April 30, 1954, the Hearing Examiner filed his initial [3] decision and found that plaintiff was selling or attempting to sell obscene books, motion pictures, playing cards and the other items mentioned in the complaint. A copy of this decision is attached hereto as Exhibit "A," and by this reference incorporated herein.

VIII.

That none of the books, motion picture films, playing cards, color slides or other items described in the complaint were offered in evidence and the Hearing Examiner reached his conclusion that they were obscene without having seen the said material.

IX.

That subsequent to the issuance of the initial decision of the Hearing Examiner, plaintiff filed her appeal from the initial decision and her exceptions.

X.

That on June 11, 1954, the Solicitor filed his brief in opposition to plaintiff and on the same day the Deputy Postmaster General, Charles R. Hook, Jr., issued the decision affirming and adopting the initial decision of the Hearing Examiner. On the same day the Deputy Postmaster General issued an order addressed to defendant, Otto E. Olesen, directing him to return to the sender all mail matter ad-

dressed to plaintiff with the word "unlawful" written or stamped on the outside thereof.

XI.

That none of the materials sold or offered for sale by plaintiff is obscene, lewd, lascivious or indecent; that the material sold or offered for sale by plaintiff isailable matter.

XII.

Unless restrained by this Court, the defendants will return to the sender all mail addressed to the plaintiff, with [4] the word "unlawful" stamped thereon; that said action will cause plaintiff irreparable loss and damage.

XIII.

That the order of the Deputy Postmaster General is a final order and plaintiff has no other adequate remedy available.

XIV.

That an actual controversy exists between plaintiff and defendants within the jurisdiction of this Court and this Court should declare the rights and other legal relations between the parties hereto.

XV.

That the said order of the Deputy Postmaster General is void and in violation of plaintiff's constitutional rights:

A. The order is unsupported by substantial evidence;

B. The order is arbitrary, capricious and an abuse of discretion, and not in accordance with law;

C. The order is violative of plaintiff's Constitutional rights guaranteed by Articles I, IV, V, VI, VII and VIII of the Amendments to the Constitution of the United States;

D. The statute under which the order was issued is unconstitutional on its face and as applied.

As and for a Separate and Distinct Cause of Action,
Plaintiff Alleges as Follows:

I.

That paragraphs I, II, III, IV, V and XIV of the first cause of action are realleged as though the same were herein and fully set forth.

II.

That on March 1, 1954, without notice or hearing and before there had been any determination of illegal activity on the part of plaintiff, defendants, and each of them, under orders of the Deputy Postmaster General, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California. [5]

III.

That although no final order averse to plaintiff was issued until June 11, 1954, defendants continued to refuse to deliver to plaintiff her mail addressed to Male Merchandise Mart as aforesaid and still

continues to refuse to deliver the said mail received by the defendants prior to June 11, 1954.

IV.

That on March 19, 1954, plaintiff filed an action in this Court, No. 16522-HW, to enjoin defendants from impounding plaintiff's mail without notice or hearing and before there had been any final determination of illegal activity. The Honorable Harry C. Westover dismissed the said Complaint on the ground that he had no jurisdiction of the matter since administrative proceedings were still pending. Plaintiff has appealed the said judgment of dismissal and the case is now pending in the Circuit Court of Appeals for the Ninth Circuit. Plaintiff made motions to the Circuit Court of Appeals and to Mr. Justice Douglas for relief pending appeal but neither of these motions were granted.

V.

The plaintiff's mail was withheld under the impound order for an unreasonable length of time.

VI.

Unless defendants and each of them are enjoined and restrained from continuing to hold plaintiff's mail and are ordered by this Court to release to plaintiff all such mail impounded prior to June 11, 1954, plaintiff will continue to be irreparably damaged.

VII.

That the said impound order is invalid for the following reasons:

a. There is no authority in law, express or implied, for the issuance of such an order. [6]

b. It violates the due process clause of the Fifth and Sixth Amendments in that it inflicts punishment upon plaintiff without due process of law.

c. It is in violation of the Administrative Procedure Act which requires a hearing and findings prior to imposition of sanctions.

d. It is in violation of the First Amendment of the United States Constitution as a prior restraint on communication. [7]

VIII.

That as a direct and proximate result of the defendants' withholding of plaintiff's mail pursuant to the invalid impound order, plaintiff has suffered damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

Wherefore, plaintiff, V. E. Stanard, prays judgment against the defendants and each of them as follows:

1. For a temporary restraining order, preliminary and permanent injunction directed to the defendants herein and each of them ordering said defendants and each of them to forthwith deliver up to plaintiff all mail matter of any kind or nature addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and enjoining the defendants and each of them from, in any manner, failing or refusing to deliver in the regular course of mailing any and all mail matter

addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and from in any manner carrying out or enforcing the final order of the Deputy Postmaster General, dated June 11, 1954.

2. For a temporary restraining order, Preliminary and permanent injunction directed to the defendants herein and each of them, ordering said defendants to forthwith deliver up to plaintiff all mail matter of any kind or nature addressed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, withheld by said defendants prior to June 11, 1954, the date of the final administrative order.

3. For a declaration by this Court that:

A. The impound order of March 1, 1954, is invalid;

B. The final order of June 11, 1954, is invalid.

4. For damages in the sum of Twenty-five Thousand Dollars (\$25,000.00).

5. For costs of suit incurred herein and for such other [8] and further relief as to the Court may seem just and proper.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff. [9]

EXHIBIT A

Office of the Deputy Postmaster General
Division of Hearing Examiners
Post Office Department
Washington 25, D. C.
H. E. Docket No. 2/292

April 30, 1954.

In the Matter of the Complaint That:

ALBERT J. AMATEAU, and V. E. STANARD,
Using the Fictitious, False or Assumed Names
and Addresses:

MALE MERCHANDISE MART, and MICHAEL
MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, and RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through
the Mails in Violation of 39 U. S. Code, Sec-
tions 255 and 259a, and of Title 18 U. S. Code,
1342 and 1461.

INITIAL DECISION OF
HEARING EXAMINER

Duplicate copies of the complaint and notice of
hearing were served on V. E. Stanard and Albert

Exhibit A—(Continued)

J. Amateau on March 3, 1954, in the manner provided by the Rules of Practice. Coincident with the issuance of the complaint and notice of hearing the Deputy Postmaster General, by order dated March 1, 1954, instructed the postmaster at Los Angeles, California, to withhold from delivery mail addressed to Male Merchandise Mart, Michael Malone and Rarepix Co. until the identity of the party or parties claiming it, and the character of the business being conducted under those names, were established upon evidence to be received at the hearing. To the complaint Albert J. Amateau filed a reply in which he disclaimed under oath [10] any connection whatever with V. E. Stanard, Male Merchandise Mart and Rarepix Co., and with the operation under those names of the business which constitutes the subject matter of the complaint. Amateau's reply further asserts that he "does not interpose any objection to the denial of the mail privileges" to the other names contained in the complaint, "except that he respectfully pleads that his name be disconnected and expunged from these proceedings." The Respondent, V. E. Stanard, filed answer in behalf of herself, Male Merchandise Mart and Michael Malone.

The hearing date was originally set for March 17, 1954. The date was moved forward, however, to accommodate Los Angeles counsel for Respondent Stanard, to March 10, 1954. At that time counsel moved for and was granted a severance of his client from Respondent Amateau and Rarepix Co. On the

Exhibit A—(Continued)

last mentioned date the hearing with respect to Respondent Stanard was conducted before me, with the understanding that for procedural purposes the hearing would be deemed as having been held on March 17, 1954. No further answer to the complaint was filed by Respondent Amateau or Rarepix Co., and no one representing Amateau or Rarepix Co. appeared on March 17, 1954. Proposed findings of fact and conclusions of law have been filed by the Solicitor and Respondent Stanard. The entire official record has been considered by me in reaching this decision.

The enterprise alleged to be in violation of the statutes invoked is averred in the complaint to be in substance the conduct through the mails by Stanard and Amateau, using the fictitious, false or assumed names Male Merchandise Mart, Michael Malone and Rarepix Co., of an unlawful enterprise involving the obtaining or attempted obtaining of remittances of money through the mails for certain articles of an obscene, lewd, lascivious, indecent, filthy and vile character, consisting of books, photographs, motion pictures, playing cards, color slides and novelties, and the giving by mail of information as to where, how and from whom these articles may [11] be obtained, in violation of the statutes invoked.

Attached to the complaint as an exhibit thereto are photostatic copies of circulars alleged to have been mailed by these Respondents, advertising of circulars alleged to have been mailed by these Re-

Exhibit A—(Continued)

spondents, advertising and offering for sale items bearing such captions and titles as: "Most Amazing Offer of Uncensored Books That Dare to Tell the Truth," "Rare Specials," "Naughty Bed-Time Books," "Books on Every Angle of Sex," "Are Ordinary Novels Too Tame for You? Here's Exciting, Intimate Reading That Gives You That Thrill! Pocket-Size Editions," "Sex in Prison," "Wild French Cartoons," "The Flimsey Report," "Racy, Risky Assortment of French Love Stories," "Wow!" "Wolf Deck," "Real Old-Time Cartoon Books," "A Cigarette Pack Peep Show," "A Pocket Art Museum," "Party Films," "To Spank or Not to Spank," "A Pack of Beauty," "Art Slides," "Body in Art," "3rd Dimension Slides" and "Beauty in Bondage." The complaint further charges that Respondents' advertising circulars contain illustrations and descriptive statements which characterize the various items offered for sale as being erotically and sexually stimulating, and, hence, as being obscene, lewd, lascivious and indecent.

The answer filed by Respondent Stanard in substance denies the charge of offering obscenity for sale. The answer also contends that the statute pursuant to which the Solicitor recommends the issuance of the order authorized thereby, to wit, Title 39 U.S. Code, Section 259a, is invalid and void as being in conflict with the Constitution of the United States. The question of constitutionality is not one for decision here (*Engineers Public Service Co. v. Securities Exchange Commission*, 138 F. (2d) 936).

Exhibit A—(Continued)

By stipulation at the hearing on March 10, 1954, supported by evidence received from the Respondent, it is established that V. E. (Violet Evelyn) Stanard is an actual individual and a person who owns, operates and does business as Male Merchandise Mart, and that the name, Male Merchandise Mart, is a fictitious firm name filed as such [12] with the County Clerk of the County of Los Angeles on February 15, 1954, pursuant to the applicable statutes of the State of California (Tr. 3, 4, 15-18). The identity of "Michael Malone," if there be such a person, is not clear. However, that name is used in Respondent Stanard's advertising circulars.

Post Office Inspectors H. J. Simon and C. E. Dunbar appeared as witnesses for the Solicitor. They identified and there were received in evidence a number of circulars soliciting remittances for the items hereinbefore mentioned to be mailed to Male Merchandise Mart (Dept. Exhibits 1-A through 1-P and 2-A through 2-I). The inspectors testified that these circulars were received through the mails addressed to various test names used by them in official investigations.

Included within this decision as pages 5, 6, 7 and 8 are photostatic copies of these advertising circulars. None of the books, motion picture films, playing cards, color slides and other items described in the circulars and mentioned in the complaint were offered in evidence. However, as explained by counsel for the Solicitor at the hearing, and as further

Exhibit A—(Continued)

elaborated upon in the Solicitor's proposed findings and conclusions, it is his position that the illustrations and language employed by Respondent in the advertising circulars to describe these wares are such as to leave no doubt that the materials offered for sale are lustfully stimulating and that the addressees of the circulars are being solicited to purchase books, pictures, films and novelties which are obscene, lewd, lascivious, indecent and filthy; and that under these circumstances, the presence of these items themselves in evidence is not necessary.

Examination of the contents of these circulars constrains me to adopt the Solicitor's proposed findings to this effect. There can be no doubt whatever that the voluptuous and provocative illustrations and textual matter appearing in these circulars [13] hold out the promise of motion pictures, color slides, books, playing cards and novelties which will have the effect in the hands of the purchasers thereof of stimulating them sexually and gratifying their lascivious cravings. Quite obviously, the circulars considered as a whole are plainly designed to pander to the prurient. In this view, the circulars themselves constitute persuasive evidence that Respondent will furnish obscenity to persons induced by the descriptive technique employed therein to order the books, pictures, playing cards and other materials offered for sale. If these circular advertisements promise obscenity, as I hold they do, it is not unfair to hold the advertiser bound by his advertising. If the materials, as actually furnished,

Exhibit A—(Continued)

are in fact innocuous and non-obscene, the advertiser should have only himself to blame for going to such extreme lengths, as is done in these circulars, to persuade his addressees to the opposite impression. Thus, the effect of these circulars is to bring this enterprise, *prima facie* at least, within the inhibition of the postal obscenity statute. Respondent did not elect to present evidence to rebut the promise of obscenity so clearly and unmistakably spelled out in the advertising circulars. I hold that the advertising circulars constitute substantial evidence of sale or attempted sale of obscene books, motion pictures, playing cards and other items mentioned in the complaint (cf. decision of District Judge Yankwich rendered June 29, 1953, in *Wallace v. Fanning*, Postmaster, U.S.D.C., Southern District of California, Eastern Division, Civil Action No. 15499-T; also *Farley v. Simmons*, 99 F. (2d) 343, and *U. S. v. Rebhuhn*, 109 F. (2d) 512, cert. den. 310 U. S. 629).

As previously indicated, hearing in this case was again convened before me on March 17, 1954, at which time further evidence was received from the Solicitor with respect to Albert J. Amateau and Rarepix Co. In this connection it will be noted that in the [14] advertising circulars received in evidence at the hearing on March 10, 1954, the names, Rarepix Company and Rarepix Co., with address given as Campbell Building, Santa Monica and Fairfax, Los Angeles 46, California, appear therein as joint participants in the enterprise here under consideration. It is also to be noted that in close juxtaposition

Exhibit A—(Continued)

to the advertising message of Rarepix Co. appears an "Important Notice," which warns recipients of the circulars that correspondence relating to the obscenity offered for sale therein should be addressed, not to Rarepix Co., but to Male Merchandise Mart.

Testimony given by Inspector H. J. Simon at the hearing session on March 17, 1954, convinces me that Albert J. Amateau is, or was, the operator of Rarepix Co., contrary to Amateau's sworn disclaimer, previously mentioned. The inspector's testimony also links Amateau with the operation of other enterprises in the past involving the sale through the mails of obscenity, against which action has been taken by this Department. For record purposes, it is therefore found that Albert J. Amateau, using the fictitious name, Rarepix Co., is, or was, a participant in the sale of the obscenity items now being offered by Male Merchandise Mart.

Respondent Stanard's requests for findings of fact and conclusions of law have been considered by me and such of them as are not herein found or concluded are rejected as being immaterial or unjustified.

I find from the evidence before me that Respondent V. E. Stanard, is employing the false, fictitious and assumed names, Male Merchandise Mart and Michael Malone, for the purpose of obtaining and attempting to obtain remittances of money through the mails for an assortment of obscene, lewd, lascivi-

Exhibit A—(Continued)

ous, indecent and filthy books, motion picture films, playing cards, color slides and novelties and is depositing or causing to be deposited in the mails information showing where, how and from whom such items may be obtained, in violation of the statutes invoked, as charged in the complaint. [15] I find also that the names, Rarepix Company and Rarepix Co., are sufficiently associated with such unlawful activity to warrant the inclusion thereof in the order hereinafter recommended.

There is attached hereto the appropriate order for execution by the Deputy Postmaster General in order to suppress the unlawful enterprise herein found.

/s/ JAMES C. HAYNES,
Chief Hearing Examiner.

Duly verified.

[Endorsed]: Filed June 22, 1954. [16]

District Court of the United States in and for the
Southern District of California, Central Division

No. 16866 PH

V. E. STANARD, Individually and d/b/a MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, and DOE I
Through DOE X,

Defendants.

ORDER TO SHOW CAUSE RE: PRELIMI-
NARY INJUNCTION AND TEMPORARY
RESTRAINING ORDER

Upon reading the verified Complaint of the plaintiff in the above-entitled matter, on file herein,

It Is Hereby Ordered that the defendant, Otto K. Olesen, Postmaster of the City of Los Angeles, State of California, appear before the District Court of the United States for the Central Division, in the Courtroom of the Honorable Peirson M. Hall, located in the Federal Building, Los Angeles, California, on the 28th day of June, 1954, at the hour of 10:00 o'clock a.m., of said day then and there to show cause, if any he has, why he should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to Male Merchandise Mart at 16887 West [18] Branch, Hollywood 46, Cali-

fornia, and why he should not be enjoined from refusing to deliver any and all such mail matter as may hereinafter be mailed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and why he should not be ordered to deliver to plaintiff any and all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and withheld by him prior to June 11, 1954, the date of the final administrative order, and why he should not be enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General, dated March 1, 1954, and the final administrative order of the Deputy Postmaster General, dated June 11, 1954.

It Is Further Ordered that, pending hearing on this Order to Show Cause, defendant, Otto K. Olesen, is ordered to keep in his possession, control and custody all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and he is enjoined from disposing of any such mail matter in any manner.

It Is Hereby Further Ordered that this order and the Complaint and Points and Authorities be served upon defendant, Otto K. Olesen, on or before the 24th day of June, 1954.

Dated: 22nd day of June, 1954.

/s/ PEIRSON M. HALL,

Service of copy acknowledged.

[Endorsed]: Filed June 22, 1954. [19]

[Title of District Court and Cause.]

ORDER

The Order to Show Cause in the above-entitled matter having come on regularly to be heard on the 28th day of June, 1954, at 10:00 o'clock a.m., before the Honorable Peirson M. Hall; Stanley Fleishman appearing for plaintiff, and Laughlin E. Waters, United States Attorney, and Max F. Deutz and Joseph D. Mullander, Assistants U. S. Attorney, appearing for defendants, and Joseph D. Mullander having moved for a continuance of the hearing of the said Order to Show Cause and consented in open court to the temporary restraining order continuing in effect to July 12, 1954, and good cause appearing therefor:

It Is Ordered that the defendant, Otto K. Olesen, Postmaster of the City of Los Angeles, State of California, and his agents, servants, employees and representatives appear before the District Court of the United States for the Central Division in [21] the courtroom of the Honorable Peirson M. Hall, located in the Federal Building, Los Angeles, California, on the 12th day of July, 1954, at the hour of 10:00 o'clock a.m., of said day then and there to show cause, if any they have, why they should not, pending trial of this action, be required to turn over and deliver in the regular course of mail to plaintiff all mail matter directed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and why they should not be enjoined

from refusing to deliver any and all such mail matter as may hereinafter be mailed to Male Merchandise Mart at 16887 West Hollywood Branch, Hollywood 46, California, and why they should not be ordered to deliver to plaintiff any and all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and withheld by them prior to June 11, 1954, the date of the final administrative order, and why they should not be enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General, dated March 1, 1954, and the final administrative order of the Deputy Postmaster General, dated June 11, 1954.

It Is Further Ordered that, pending hearing on this Order to Show Cause, defendants, Otto K. Olesen, his agents, servants, employees and representatives are ordered to keep in their possession, control and custody all mail matter addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and they are enjoined from disposing of any such mail matter in any manner.

It Is Hereby Ordered that on or before July 7, 1954, defendant, Otto K. Olesen, serve upon Stanley Fleishman his Return to the Order to Show Cause together with a copy of the entire administrative proceeding in the matter of the Male Merchandise Mart bearing Post Office Department Hearing Examiner's Docket No. 2/292, and his Points and Authorities, and all other papers upon which he will rely in resisting the Order to Show Cause. [22]

Dated: This 1st day of July, 1954.

/s/ PEIRSON M. HALL,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 1, 1954. [23]

EXHIBIT A

(Attached to the Reply to the Order to Show Cause.)

Post Office Department, Washington

June 24, 1954.

I certify that the annexed papers are true copies of the original documents on file in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

[Seal] /s/ ABE MCGREGOR GOFF,
The Solicitor. [43]

Post Office Department, Washington

June 11, 1954.

Order No. 55656.

Satisfactory evidence having been presented to the Post Office Department that Male Merchandise Mart, Michael Malone, Rarepix Company, Rarepix

Co., and their agents and representatives as such, at Hollywood, California, are using the United States mails in violation of Section 259a of Title 39, United States Code, which prohibits the obtaining, or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and the depositing, or causing to be deposited, in the mails information as to where, how, or from whom the same may be obtained, said evidence being a part of the record in the case identified below by docket number, and by authority vested in the Postmaster General by said law and by him delegated to me by order of the Postmaster General No. 55507, dated January 13, 1954, you are hereby forbidden to pay any postal money order drawn to the order of said concerns and parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

By the same authority you are hereby further instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concerns and parties to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words, "Unlawful: Mail to this

address returned by order of the Postmaster General," plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the appropriate dead letter branch with the words, "Unlawful: Mail to this address returned by order of the Postmaster General," plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

By direction of the Postmaster General.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster General.

(Case No. 8668-E)

(H. E. Docket No. 2/292)

To the Postmaster,

Hollywood, Los Angeles, California. [44]

Post Office Department, Washington

June 11, 1954.

H. E. Docket 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU and V. E. STANARD,
Using the Fictitious, False or Assumed Names
and Addresses:

MALE MERCHANDISE MART and MICHAEL
MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through
the Mails in Violation of 39 U. S. Code, Sections
255 and 259a, and of Title 18 U. S. Code, 1342
and 1461.

DECISION OF THE DEPUTY
POSTMASTER GENERAL ON APPEAL

The Hearing Examiner in this case rendered an
initial decision on April 30, 1954, in which it was
found that the Respondent is engaged in conducting
an enterprise through the mails in violation of the
statutes invoked, as alleged in the Complaint.

The Respondent has appealed from the Hearing Examiner's initial decision and has filed an appeal brief containing exceptions thereto. The Solicitor has filed a reply brief. The entire official record has been reviewed and upon the basis thereof this decision is made. [45]

Careful review of the initial decision of the Hearing Examiner discloses no erroneous findings of fact or conclusions of law insofar as is determinable from the official record. It is founded upon substantial evidence and sound reasoning and contains correct findings of fact and conclusions of law upon all material issues. Therefore, it is hereby adopted and affirmed as the decision of the Post Office Department in this case and the order recommended by the Examiner shall be issued and is hereby made a part hereof by reference.

/s/ CHARLES R. HOOK, JR.,
Deputy Postmaster
General. [46]

INITIAL DECISION OF HEARING EXAMINER

[The Initial Decision of Hearing Examiner is identical to Exhibit A attached to the Complaint and is set out in full at pages 11 to 19 of this printed record.]

Post Office Department
Office of the Solicitor
Washington 25, D. C.

BEH:omd

Sol. Doc. 5/32

June 11, 1954.

H. E. Docket No. 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU, and V. E. STANARD,
Using the Fictitious, False or Assumed Names
and Addresses:

MALE MERCHANDISE MART, and MICHAEL
MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through
the Mails in Violation of 39 U. S. Code, Sections
255 and 259a, and of Title 18 U. S. Code, 1342
and 1461.

SOLICITOR'S REPLY TO RESPONDENTS'
BRIEF ON APPEAL

Pursuant to Section 150.423 of the Rules of Prac-
tice and at the direction of the Hearing Examiner,

the following reply to respondents' brief on appeal is respectfully submitted:

Examination of the respondents' brief on appeal discloses that the matters therein set out, except for the Impound Order, have been fully covered in the proposed findings of fact and conclusions of law previously filed by the Assistant Solicitor. Respondents' exception to the Examiner's initial decision that the circulars constitute persuasive evidence that obscenity will be furnished to persons induced by the descriptive technique employed therein is based [59] on hearsay and unsupported by substantial evidence, is not a valid exception. Post Office Inspectors H. J. Simon and C. E. Dunbar appeared as witnesses for the Solicitor. They identified and there were received in evidence circulars soliciting remittances for the books, pictures, playing cards and other materials offered for sale. The inspectors testified that the said circulars were received through the mails addressed to various test names used by them in their official investigation. The introduction of this evidence established the basic fact, namely, that the respondent was sending circular matter through the mails soliciting remittances for certain motion pictures, color slides, books, playing cards and novelties. Once this basic fact was established, as it clearly was here, the Hearing Examiner was permitted to examine the circulars and draw a conclusion based on common sense enlightened by human knowledge and experience. The Examiner, after perusing the circulars, found that they were plainly

designed to pander to the prurient and the circulars were persuasive evidence that the respondent will furnish obscenity to persons induced by the descriptive technique employed in the said circulars. Such a conclusion, as an inspection of the circulars in evidence will clearly show, was the only one common sense enlightened by human knowledge and experience would allow and the courts have so held. On June 29, 1953, a decision on this point was rendered by District Judge Yankwich, sitting in the U. S. District Court, Southern District of California, Eastern Division, in the case of [60] Lee A. Wallace, a/k/a W. A. Lee, v. Fanning, Postmaster, Civil Action No. 15499-T. In his finding of fact the Judge states that the Postmaster General had circulars sent through the mails soliciting addressees:

“To purchase a certain device which, as disclosed by the pictures in the said obscene and indecent literature, consisted of a completely nude woman with large breasts accentuated in the pictures.”

The Court held that the Postmaster General, upon the basis of the circulars, properly concluded that “W. A. Lee” was obtaining and attempting to obtain remittances of money through the mails for an obscene article in violation of 39 U. S. Code 259a, and stated as a conclusion of law:

“1. That the Postmaster General had substantial evidence to support his findings, which was fairly arrived at, that the plaintiff and his agents and representatives were using the

United States mails in violation of 259a of Title 39, United States Code, for the purpose of obtaining or attempting to obtain remittances of money through the mails for an obscene, lewd, lascivious, indecent, filthy, or vile article, and the finding and order of the Postmaster General are not reviewed by this Court.”

To the same effect is the case of *United States v. Rebhuhn*, 109 F. (2d) 512, cert. den. 310 U. S. 629, wherein the Court states that:

“the circulars were no more than appeals to the salaciously disposed and no sensible jury could have failed to pierce the fragile screen, set up to cover that purpose.”

Indisputably the Court in the above statement held the advertisements to be obscene, even though under certain conditions the books “were [61] not obscene per se.” The conclusion is inescapable that the Court concluded that the advertisements represented to the purchaser that he would furnish obscene books in return for his remittance through the mails.

Clearly the evidence in the instant case required the Examiner to reach the conclusion he did reach that this enterprise falls within the provisions of the postal obscenity statutes. Respondent did not elect to present evidence to rebut the promise of obscenity so clearly and unmistakably spelled out in the advertising circulars.

As stated in 31 C. J. S. Evidence, Section 117:

“A presumption of law is an inference which, in the absence of direct evidence on the subject,

the law requires to be drawn from the existence of certain established facts; a presumption which the law compels, and which may be conclusive or rebuttable; a rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will therefore sustain the burden of evidence, until conflicting facts on the point are shown. Where such evidence is introduced, the presumption is *functus officio* and drops out of sight, but the evidence must be credible." (Footnotes omitted.)

The evidence supporting the Examiner's initial decision is clearly substantial and based on the whole record. The Lee A. Wallace case, *supra*, a case almost identical in facts to the instant one, held that the Postmaster General had substantial evidence to support his findings.

Hannegan v. Esquire, 327 U. S. 146, cited by counsel for respondent is not in point in the instant case. The *Esquire* case specifically [62] held that the Postmaster General is without power to prescribe standards for literature or art which aailable periodical (not obscene) disseminates, or to determine whether the contents of the periodical meet some undefined standard of what might be good for the public.

In the instant case the Hearing Examiner's initial decision was not in the least concerned with

what might be good or bad art or literature or what he personally might deem good for the public. The Examiner deals only with the issue of whether or not respondent is obtaining or seeking to obtain money through the mails for articles of an obscene character as described and held out by the advertisements. This fact he found clearly and unmistakably spelled out. The Esquire case, *supra*, at page 158, recognizes the validity of the obscenity laws in that the mails "may not be used to satisfy all tastes, no matter how perverted."

With respect to the Impound Order, the Department maintains the position that Justice Douglas has not had an opportunity to examine the facts. Therefore, the Impound Order should not be considered unlawful until a full judicial review of law and facts has been had by a court of competent jurisdiction. Moreover, both the U. S. District Court and the Court of Appeals in effect upheld the legality of the Order and it is not clear that Justice Douglas had jurisdiction to adjudicate the question presented. Justice Douglas, in effect, expresses his lack of certainty as to what authority he did have and states at page 6 of his opinion: "Since petitioner will, in due course, get judicial review of the important question of law tendered and since the action I am asked to take runs counter to the requirements of orderly procedure, I will deny the relief asked." [63]

Reference to the record as a whole in the case against respondent shows that the Initial Decision

is correct, and that it is amply supported by the evidence presented and the testimony given at the hearing. The Solicitor's proposed findings of fact and conclusions of law cite sound legal authority for the issuance of an "Unlawful" order against Male Merchandise Mart, Michael Malone, Rarepix Company and Rarepix Co., at Los Angeles, California.

Inasmuch as no new issues have been raised in respondent's appeal brief, except those dealt with above, and no sound reason has been advanced showing error in the Initial Decision of the Hearing Examiner, it is respectfully recommended that the said decision be adopted by the Deputy Postmaster General and an order forthwith issue against respondents in this case.

/s/ WILLIAM C. O'BRIEN,
Assistant Solicitor,
Post Office Department.

To the Administrative Assistant.

To the Deputy Postmaster General. [64]

SUBJECT INDEX

| | Page |
|--|------|
| Table of Authorities | |
| I. Statement of the Case | 37 |
| II. Exception to Specific Findings and Conclusions of Fact or Law and Exception to the Failure of the Initial Decision to Include Other Findings or Conclusions of Fact or Law | 38 |
| III. Argument | 39 |

Table of Authorities

| | Page |
|---|------|
| Hannegan v. Esquire, 327 U. S. 146 | 39 |
| Stanard v. Olesen, May 22, 1954, by Mr. Justice Douglas in chambers | 39 |
| Universal Camera Corp. v. National Relations Board, 340 U. S. 477 | 40 |

Post Office Department
Office of Hearing Examiners
Washington 25, D. C.

H. E. Docket No. 2/292

In the Matter of the Complaint That:

ALBERT J. AMATEAU and V. E. STANARD,
Using the Fictitious, False or Assumed Names
and Addresses:

MALE MERCHANDISE MART and MICHAEL
MALONE, at
16887 West Branch,
Hollywood 46, California, and

RAREPIX COMPANY, RAREPIX CO., at
Campbell Building,
Santa Monica and Fairfax,
Hollywood 46, California,

Are Conducting an Unlawful Enterprise Through
the Mails in Violation of 39 U. S. Code, Sections
255 and 259a, and of Title 18, U. S. Code, 1342
and 1461.

APPEAL FROM INITIAL DECISION

I.

Statement of the Case

The Solicitor of the Post Office Department filed a Complaint against V. E. Stanard and another, d/b/a Male Merchandise Mart, and other names alleging that the said Stanard was engaged in the unlawful enterprise of attempting to obtain remit-

tances of money through the mail for certain articles of obscene, etc., nature. [67] The case of Stanard was severed from the others and the case against her proceeded without reference to the others. It was established that Stanard is an actual individual who owns the Male Merchandise Mart and that she filed a proper certificate with the County Clerk of Los Angeles County.

At the same time that the Solicitor filed his Complaint the Deputy Post Master General issued an impound order which order was and is final and which order was not the subject of the hearing on the Solicitor's Complaint held in Washington, D. C., March, 1954.

The chief Hearing Examiner found that there was evidence that Stanard was obtaining and attempting to obtain money through the mails for obscene matter although the matter that Stanard was sending through the mail was not introduced in evidence. The Hearing Examiner held that "the circulars themselves constituted persuasive evidence," that the matter Stanard did mail would be obscene.

II.

Exception to Specific Findings and Conclusions of Fact or Law and Exception to the failure of the Initial Decision to Include Other Findings or Conclusions of Fact or Law:

(a) Stanard excepts to the failure of the Hearing Examiner to include or discuss her findings of

fact II, III, IV, VI, VII, and her conclusion of law I.

(b) Stanard excepts to the finding and conclusion of the Hearing Examiner that she is engaged in a business of sending obscene matter through the mail.

III.

Argument

The impound order issued by the Deputy Postmaster [68] General is invalid and should be voided:

Although the impound order was not the subject of the Administrative hearing, the Postmaster has the power, authority and duty to revoke it if it is an invalid order. It is an invalid order; see *Stanard vs. Olesen*, May 22, 1954, by Mr. Justice Douglas in chambers.

(b) The finding of fact and conclusion of law that Stanard is engaged in the business of mailing obscene matter is:

1. Arbitrary, capricious, an abuse of discretion and not in accordance with law;
2. Contrary to constitutional right and power;
3. In excess of statutory jurisdiction, authority or limitations and short of statutory right;
4. Unsupported by substantial evidence and unwarranted by the facts.

There is a distinction between Obscenity and naughtiness, *Hannegan vs. Esquire*, 327 U. S. 146, which has not been here recognized.

The requirement of the Administrative Procedural Act that a final order must be based upon substantial evidence means that the order must be based upon more than hearsay evidence; see *Universal Camera Corp. vs. National Relations Board*, 340 U. S. 477. The finding here that Stanard is mailing obscene matter through the mail is based wholly on hearsay evidence and as such is unsupported by substantial evidence and therefore void.

Conclusion: The initial decision of the Hearing Examiner is unsupported by substantial evidence and void as a matter of law. The Postmaster General should issue an order dismissing the Complaint. The Postmaster General should also issue an order voiding the impound order whether or not he dismisses the Complaint [69] since the impound order is invalid.

.....,
STANLEY FLEISHMAN. [70]

Post Office Department, Washington

I certify that the annexed true
of the original in this Department.

In testimony whereof I have hereto set my hand, and caused the seal of the Post Office Department to be affixed, at the City of Washington, the day and year above written.

.....,
Postmaster General of the United States of America. [71]

EXHIBIT B

(Attached to the Reply to Order to Show Cause)

United States District Court, Southern District of
California, Central Division

Civil Action No. 16866-PH

V. E. STANARD, Individually and Doing Business
Under the Firm Name and Style of MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, Individually and as Postmas-
ter of the City of Los Angeles, State of Cali-
fornia, et al.,

Defendant.

Mr. William C. O'Brien, being duly sworn, says:

(1) That he is Assistant Solicitor for the Post Office Department and has been employed as an attorney in the Office of the Solicitor at all times mentioned hereafter;

(2) That he is personally familiar with the matters stated herein except as to those relating to criminal proceeding against David S. Alberts which are matter of official record;

(3) That he has personally participated in all or practically all of the formal proceedings instituted by the Post Office Department against David S. Alberts and his wife, Violet Evelyn Alberts, nee

Stanard, doing business under various names as hereinafter set forth;

(4) That several fraud orders have been issued against various enterprises conducted through the mails by David S. Alberts in which money was solicited and obtained by means of false and fraudulent pretenses, representations and promises made by both in order to obtain the sale of numerous books, photographs relating to sexual matter and a preparation for delaying ejaculation, said enterprises having been determined by the Postmaster General to constitute violations of Title 39, U. S. Code, Sections 259 and 732. The name of such enterprises and the dates on which the orders were issued are as follows:

The Camera King,
 "Camera" King,
 Camera King, and
 Camera, at Hollywood, California. [73]

Charge: Fraud—Sale of alleged obscene photographic prints.

Fraud Order issued July 7, 1948.

* * *

David S. Alberts,
 D. S. Alberts, and
 Intimate Publications, at
 Hollywood, Los Angeles, California.

Charge: Fraud—Sale of alleged obscene books and photographs and a preparation for delaying ejaculation.

Fraud Order issued March 29, 1950.

(5) Numerous other enterprizes which were conducted through the mails by David S. Alberts and Violet Evelyn Alberts, nee Stanard, have been the subject of orders stopping the delivery of mail which were issued by the Postmaster General pursuant to the provisions of Title 39, U. S. Code 255 and 18 U. S. Code 1342 and 1461, upon substantial evidence showing that David S. Alberts or Violet Evelyn Alberts, nee Stanard, were conducting through the mails unlawful businesses under fictitious names. The names of said enterprises and the dates on which the orders were issued are as follows:

V. E. Stanard, under the false, assumed and fictitious name and address:

House of McCoy at
Box 7942, Del Valle Station,
Los Angeles, California.

Charge: Sale of obscene photographs.

Fictitious Order issued June 10, 1948.

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Hollywood Extras, at
Box 848 Preuss Station,
Los Angeles 5, California, and
1605 N. LaBrea,
Hollywood 28, Los Angeles, California.

Charge: Sale of obscene photographs.

Fictitious Order issued June 30, 1948. [74]

* * *

David S. Alberts, under the false, assumed and fictitious names and address:

Novelty Shop, and
Box 167, at
Hollywood 28, Los Angeles, California, and
Stephen Allen, at
Box 167,
Hollywood 28, Los Angeles, California.

Charge: Sale of obscene cartoon books and photos.

Fictitious Order issued October 14, 1948.

* * *

David Stephen Alberts, under the false, assumed and fictitious names and address:

Rex Sales Company, and
Rex Sales Co., at
P.O. Box 9817,
Hollywood, Los Angeles, California.

Charge: Sale of obscene photographs in evasion of fictitious orders issued June 30, 1948, against Hollywood Extras, and on October 14, 1948, against Novelty Shop, et al., both at Los Angeles, California.

Supplemental Fictitious Order issued December 13, 1948.

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

V. E. Alberts, at
5402A W. Pico Avenue,
Los Angeles 35, California.

Charge: Sale of obscene photographs—Evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order No. 39703 issued January 27, 1949.

Note: March 3, 1949—Postmaster General issued order modifying fictitious order of January 27, 1949, to apply to mail addressed to V. E. Alberts, at 5402A W. Pico Avenue, Los Angeles 35, California.

Fictitious order of January 27, 1949, revoked in its entirety June 8, 1949. [75]

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

Q. T. Studios, at
55 E. Washington St.,
Chicago 2, Illinois.

Charge: Sale of obscene motion picture films in evasion of fictitious order issued June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued February 15, 1949.

* * *

David Stephen Alberts, under the false, assumed and fictitious name and address:

Jack Riley, at
Box 2087,
Hollywood 28, California.

Charge: Sale of obscene photographs. Evasion of

fictitious order issued June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued February 17, 1949.

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Gem Studios, at
P.O. Box 9817, Los Feliz Station,
Los Angeles 27, California.

Charge: Sale of obscene booklets—Extension of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order issued March 28, 1949.

* * *

David S. Alberts, under the false, assumed and fictitious names and address:

Triangle,
Triangle Studios,
Triangle Co., and
P.O. Box 2388, at
Hollywood, Los Angeles, California.

Charge: Sale of obscene photographic slides—Evasion of fictitious order of June 30, 1948, against Hollywood Extras at Los Angeles, California.

Supplemental Fictitious Order issued September 16, 1949. [76]

* * *

David S. Alberts, under the false, assumed and fictitious name and address:

Variety Publishing Co., at
Hollywood, Los Angeles, California.

Charge: Fictitious sale of obscene material in evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Supplemental Fictitious Order issued October 31, 1949.

* * *

David Stephen Alberts, using, assuming and requesting to be addressed by a name other than his own true and proper name, to wit:

I. Lindquist, at
Los Angeles, California.

Charge: Sale of obscene photographs—Evasion of fictitious order issued June 30, 1948, against Hollywood Extras, at Los Angeles, California.

Fictitious Order issued November 29, 1949.

(7) Upon information and belief based upon the records of the Post Office Department, David S. Alberts has been criminally prosecuted for his activities as a dealer in obscene matter. Said prosecutions are as follows:

December, 1950—Fined \$200 in Los Angeles Federal Court.

June, 1950—Fined \$500 and sentenced to 180 days in jail on condition that he serve 60 days, and placed on probation for three years in Los Angeles Municipal Court.

(8) The Post Office Department is daily receiv-

ing complaints from persons living in various parts of the United States who object to receipt of the advertisements sent to them through the mails by plaintiff Violet Evelyn Stanard using the false, fictitious and assumed names Male Merchandise Mart and Michael Malone. Said complaints denounce plaintiff's advertisements (copies whereof are hereto attached) [77] as obscene, lewd, lascivious, indecent and contrary to the standards of the community. Such complaints are typical of thousands of similar complaints which have been directed to the Post Office Department, to members of Congress, to the President of the United States and others in official life, with respect to numerous enterprises hereinbefore named which plaintiff and her husband have conducted through the mails under constantly changed fictitious names which complaints affiant in his capacity as an employee of the Department has had occasion to read.

(9) That the use of such fictitious names of plaintiff and her husband, David S. Alberts, is a device whereby they may defeat the enforcement of the United States statutes prohibiting the use of the mails to conduct unlawful enterprises in violation of the postal fraud and obscenity statutes.

/s/ WILLIAM C. O'BRIEN.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 25th day of June, 1954.

[Seal] /s/ CHARLOTTE B. STILLWELL,
Notary Public.

My Commission expires 1-31-58. [78]

EXHIBIT C

(Attached to the Reply to Order to Show Cause)

United States District Court for the Southern
District of California, Central Division

No. 16866-PH

V. E. Stanard, Individually and d/b/a MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, and DOE I
Through DOE X,

Defendants.

AFFIDAVIT OF RALPH E. STAPENHORST

United States of America,
Southern District of California—ss.

Ralph E. Stapenhorst, being first duly sworn, deposes and says:

That I am a Post Office Department Inspector for the Post Office Department in Los Angeles, California, and have been so employed at all times hereinafter mentioned.

That I am personally familiar with the matters stated herein.

That I have personally participated in all or practically all of the investigations conducted by the Post Office Department in regard to David S.

Alberts and his wife, Violet Evelyn Alberts, nee Stanard, doing business under various fictitious firm names, including the fictitious firm name of Male Merchandise Mart.

That I believe that V. E. Stanard is the wife of David Stephen Alberts. This information was obtained by examining the records of the Los Angeles County Clerk, which records revealed that marriage license No. 20982 was obtained by David Stephen Alberts and Violet Evelyn Stanard in October of 1947, and that marriage certificate No. 32345 for David Stephen Alberts and Violet Evelyn Stanard, dated October 25, 1947, is contained in book 2897, page 6, of the marriage record of the Los Angeles County Clerk. Said marriage certificate discloses that David Stephen Alberts is self-employed in the mail-order business.

That I personally investigated the case of V. E. Alberts, also known as Violet Reams, doing business as Rex Sales Company, vs. Fanning, Postmaster, No. 8986-Y. In the course of that investigation the following occurred. On July 1, 1948, a person applied for and rented Post Office Box 9817 as Los Feliz Station of the Los Angeles Post Office Department. On the application that person listed the name of the applicant as Rex Sales Company, and signed her name as Violet Reams, giving her address as 6840 Fountain Avenue, Hollywood 28, California. I thereafter went to 6840 Fountain Avenue, Hollywood 28, California. I found that there was no such number on Fountain Avenue.

Thereafter, I wrote to Violet Reams at Post Office Box 9817, Los Feliz Station of the Los Angeles Post Office Department, wherein I requested that she come to my office for an interview on October 15, 1948. On that date there came to my office a woman who represented herself to be Violet Reams. She was accompanied by her attorney, a Mr. William Strong. Mr. Strong assured me that the woman with him was Violet Reams, and I therefore did not require identification. I was thereafter present in the courtroom of Judge Yankwich on December 24, 1948, at which time the case of V. E. Alberts, also known as Violet Reams, doing business as Rex [85] Sales Company, vs. Fanning, Postmaster, No. 8986-Y, was being heard. At that time I observed a woman who accompanied the attorney for the plaintiff. She was the same woman who had previously represented to me that she was Violet Reams. I was also present in the courtroom of Judge Hall on Monday morning of June 28, 1954. At that time I observed the woman who accompanied Mr. Fleishman, attorney for the plaintiff in this action. She was the same woman who had previously represented to me that she was Violet Reams and who had accompanied the attorney for the plaintiff in the case of Alberts vs. Fanning, on December 24, 1948.

That I personally investigated the case of United States of America vs. D. S. Alberts, No. 21512-PH. I was present in the courtroom of Judge Hall when D. S. Alberts pleaded guilty to violation of 18

U. S. C. A. 1461, for mailing obscene matter, and was sentenced to pay a fine of \$200.00.

That I am personally familiar with the Los Angeles Municipal Court Criminal Case, No. 02189, involving D. S. Alberts, under the following circumstances. On November 14, 1949, I was notified by the Los Angeles Police Department that D. S. Alberts had been arrested that day on a warrant charging violation of Los Angeles Municipal Code and the California Penal Code, with regard to selling or keeping for sale obscene and indecent writings, prints, pictures and other matter. At about 7 p.m., on said date I went to the Hollywood Police Station and there observed 41 boxes of alleged obscene and indecent writings, prints, pictures and other matter, which had been taken by the police as evidence. I was informed by the police officers that this evidence had been obtained from the premises of D. S. Alberts. I had been notified by the police officers of the arrest, because the material taken indicated that it was obviously being disseminated by mail. Upon inspecting the material, I observed many envelopes, stamps and mailing [86] lists. There were approximately 18 metal file trays which contained mailing lists. Later I inquired of the City Attorney of Los Angeles, as to the disposition of the case. I was informed that in the Municipal Court of Los Angeles, Alberts had been found guilty of violating Section 311(3) of the California Penal Code, and on June 16, 1950, was sentenced to 180 days in jail, suspended on condition

that he serve 60 days, pay a \$500.00 fine, and remain on probation for three years. Later, upon inspection of the records of the Clerk of the Municipal Court of the City of Los Angeles, I learned that probation was suspended in February of 1951.

That I have personally inspected the mail addressed to Male Merchandise Mart, which is presently being impounded by the Post Office Department in Los Angeles. The mail received before June 11, 1954, is being kept separate and intact from the mail received after June 11, 1954. The bulk of the total mail has been received before June 11, 1954. I would estimate that the mail received before June 11, 1954, constitutes approximately 98% of the total mail. It further appears from the amount of mail received after June 11, 1954, that the amount to be received in the future, if any, will be relatively insignificant when compared to the amount of mail received before June 11, 1954.

/s/ RALPH E. STAPENHORST,
Affiant.

Subscribed and sworn to before me this 1st day of July, 1954.

[Seal] EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

By /s/ CHARLES E. JONES,
Deputy.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 7, 1954. [87]

[Title of District Court and Cause.]

AFFIDAVIT OF STANLEY FLEISHMAN

State of California,
County of Los Angeles—ss.

Stanley Fleishman, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff in the above-entitled matter.

That he received a copy of the Order of the Court of Appeals for the Ninth Circuit, attached hereto and marked Exhibit "A" and by this reference incorporated herein. That subsequently and on July 27, 1954, he mailed to the Court of Appeals his Consent to Dismissal, attached hereto as Exhibit "B" and by this reference incorporated herein.

/s/ STANLEY FLEISHMAN.

Subscribed and sworn to before me this 27th day of July, 1954.

[Seal] /s/ IRMA HIRSCHSON,
Notary Public in and for Said
County and State. [89]

EXHIBIT "A"

At a Stated Term, to wit: The October Term, 1953, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday the sixteenth day of July in the year of our Lord one thousand nine hundred and fifty-four.

Present: Honorable William Healy, Circuit Judge,
Presiding,
Honorable Homer T. Bone, Circuit Judge,
Honorable William E. Orr, Circuit Judge,

No. 14361

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually, and as Postmaster of the City of Los Angeles, State of California,

Appellee.

ORDER THAT APPELLANT SHOW CAUSE WHY APPEAL SHOULD NOT BE DISMISSED

Good cause therefor appearing, it is Ordered that the appellant file with the clerk of this court on or before July 27, 1954, proper showing why the appeal in this cause should not be dismissed as [90] moot.

EXHIBIT "B"

United States Court of Appeals, Ninth Circuit

No. 14361

V. E. STANARD, Individually and Doing Business Under the Firm Name and Style of MALE MERCHANDISE MART,

Appellant,

vs.

OTTO K. OLESEN, Individually, and as Postmaster of the City of Los Angeles, State of California,

Appellee.

CONSENT TO DISMISSAL OF APPEALS AS
MOOT

Plaintiff, through her attorney, consents to the dismissal of the Appeal as moot.

Dated: July 27, 1954.

.....,
STANLEY FLEISHMAN,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 28, 1954. [91]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The Order of The Postmaster General of March 1st, 1954, was made without notice or hearing of any kind whatsoever. It directed the defendant Postmaster to refuse to deliver plaintiff's mail to her and to impound it. It was made under the purported authority of 39 U. S. C. 259(a). No statutory authority exists for it or any such order. It is void. It should be noted that while the Government contends in this proceeding that such statutory authority presently exists, the Post Office Department is at the same time contending that it does not in seeking the passage of legislation calculated to permit it. See H. R. 569, 83rd Cong.

The Order of June 11th, 1954, made after notice and a hearing (of sorts) is void. No evidence of any kind was [93] offered or received before the Post Office Department to support the conclusion that the matter for which the use of the mail was forbidden by the order, is within the prohibition of the statute; none of such matter was offered or received. The circulars advertising the material were the only things received, and they are specifically found not to be within the prohibited terms of obscenity, etc., of the statute. For the solicitor of the Post Office Department and the Postmaster General to find that something is obscene, lewd, lascivious, indecent, filthy or vile, without even seeing it or a copy or a fac similie of it, contemplates that Con-

gress intended that the right to use the mails should be subject to some government administrators power of divination or clairvoyance. Such powers are not recognized in any Act of Congress I have ever seen. Chief Justice Hughes in *U. S. vs. Macintosh*, 283 U. S. 605 spoke of departmental zeal outrunning statutory authority. I have seen many examples of it, but none so arbitrary as the instant order.

It is not necessary to reach to the constitutional questions as both the orders are void as being in excess of the statutory powers of the Postmaster General.

Plaintiff's counsel will prepare Findings, Conclusions and Judgment for Injunctions pendente lite.

/s/ PEIRSON M. HALL,

United States District Judge.

Dated: August 4th, 1954.

[Endorsed]: Filed August 4, 1954. [94]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above matter having come on for hearing upon the Order to Show Cause on June 28, 1954, and on July 12, 1954, before the Hon. Peirson M. Hall, Judge presiding; Stanley Fleishman appearing for the plaintiff, and Laughlin E. Waters, United

States Attorney, and Max F. Deutz and Joseph D. Mullender, Assistants United States Attorney, appearing for defendants, and the Court having examined the file and heard oral argument and having taken the cause under submission and having filed its memorandum opinion, now makes its Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That at all times since March 1, 1954, Otto K. Olesen was and he now is the duly appointed, qualified and acting [95] Postmaster of the City of Los Angeles, State of California, charged with the duty of administering and managing the United States Post Office in and for said City, and in charge of and responsible for the receipt and distribution of material sent through the United States Mails for delivery in and from said City.

II.

That plaintiff, V. E. Stanard is and has been engaged in the business of distributing and selling through the mail certain publications, pin-up pictures and novelties under the firm name and style of Male Merchandise Mart.

III.

That on March 1, 1954, the Solicitor of the Post Office Department issued a complaint against plaintiff charging that she was carrying on by means of the Post Office, under the firm name and style of

Male Merchandise Mart, a scheme for obtaining money for articles of an obscene character.

IV.

That on March 1, 1954, without notice or hearing, and before there had been any determination of illegal activity on the part of plaintiff, defendant Otto K. Olesen, under orders of the Deputy Postmaster General, impounded and refused to deliver to plaintiff any mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California.

V.

Plaintiff answered the Solicitor's complaint and denied the charge. On March 10, 1954, a hearing was held in Washington, D. C. None of the books, motion picture films, playing cards, color slides or other items described in the complaint as being obscene, were offered or received in evidence. Circulars mailed by the plaintiff were offered in evidence in the said administrative hearing. [96]

VI.

On April 30, 1954, the Hearing Examiner filed his initial decision and found that plaintiff was selling or attempting to sell obscene books, motion pictures, playing cards and other items described in the complaint. On June 11, 1954, the Deputy Postmaster General issued a decision affirming and adopting the initial decision of the Hearing Examiner and on the same day the Deputy Postmaster General issued an order addressed to defendant Otto K. Olesen directing him to return to the senders all mail mat-

ter addressed to the plaintiff with the word "unlawful" written or stamped on the outside thereof.

VII.

That from March 1, 1954, to June 11, 1954, defendant Otto K. Olesen refused to deliver to plaintiff her mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, pursuant to the impound order of March 1, 1954.

VIII.

That from June 11, 1954, to date, defendants have refused to deliver to plaintiff her mail addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, pursuant to the final Administrative order of June 11, 1954.

IX.

That plaintiff has exhausted all of her administrative remedies.

X.

That there was no evidence in the administrative hearing that any of the material sold or offered for sale by plaintiff, or any of the circulars distributed by the plaintiff was obscene, lewd, lascivious, indecent, filthy or vile.

XI.

That no Findings or Conclusions are made with respect to the constitutionality of the statutes under which the orders [97] were made.

Conclusions of Law

I.

That the impound order of the Deputy Postmaster General dated March 1, 1954, is a final order.

II.

That the order of the Deputy Postmaster General dated June 11, 1954, is a final order.

III.

That the plaintiff has exhausted all of her administrative remedies and is entitled to injunctive relief for the reason that she has no other adequate remedy available.

IV.

That the impound order dated March 1, 1954, is invalid and void for the reason that there is no authority in law for the issuance of such an order without notice or hearing.

V.

That the order of June 11, 1954, is invalid and void for the reason that it is unsupported by substantial or any evidence and is arbitrary, capricious and an abuse of discretion and not in accordance with law.

VI.

That plaintiff is entitled to a preliminary injunction directed to the defendant, Otto K. Olesen, his agents, servants and employees, ordering them and each of them to forthwith deliver up to plaintiff all mail matter of any kind or nature in their posses-

sion, or custody or under their control, addressed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, and enjoining the defendants and each of them from in any manner failing or refusing to deliver in the regular course of mail any and all mail matter addressed to Male Merchandise [98] Mart, at 16887 West Branch, Hollywood 46, California, and from in any manner carrying out or enforcing the Deputy Postmaster General's order dated March 1, 1954, or the Deputy Postmaster General's order dated June 11, 1954.

Aug. 13, 1954.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form.

.....,
Attorneys for Defendants.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Lodged August 5, 1954.

[Endorsed]: Filed August 13, 1954. [99]

District Court of the United States in and for the
Southern District of California, Central Division

No. 16866-PH

V. E. STANARD, Individually and d/b/a MALE
MERCHANDISE MART,

Plaintiff,

vs.

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, and DOE I
Through DOE X,

Defendants.

ORDER GRANTING PRELIMINARY
INJUNCTION

To Otto K. Olesen, Postmaster of the City of Los
Angeles, State of California, and his agents,
servants and employees:

The above matter having come on for hearing
upon the Order to Show Cause on June 28, 1954,
and on July 12, 1954, before the Hon. Peirson M.
Hall, Judge presiding; Stanley Fleishman appear-
ing for the plaintiff, and Laughlin E. Waters,
United States Attorney, and Max F. Deutz and
Joseph D. Mullender, Assistants United States At-
torney, appearing for defendants, and the Court
having examined the file and heard oral argument
and having taken the cause under submission and
having filed its memorandum opinion and its Find-
ings of Fact and Conclusions of Law, and good
cause appearing therefor:

It Is Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order [101] the defendant, Otto K. Olesen, and his agents, servants and employees are ordered to turn over and deliver to plaintiff, V. E. Stanard, all mail matter directed to Male Merchandise Mart at 16887 West Branch, Hollywood 46, California, which is in their possession or custody or under their control.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are hereby enjoined and restrained from failing or refusing to deliver to plaintiff in the regular course of mail, any and all properly addressed prepaid letters, cards and packets, addressed to Male Merchandise Mart, at 16887 West Branch, Hollywood 46, California.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are hereby enjoined from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General dated March 1, 1954, impounding plaintiff's mail.

It Is Further Ordered, Adjudged and Decreed that during the pendency of this action or until the Court shall otherwise order, the defendant, Otto K. Olesen, and his agents, servants and employees are

hereby enjoined from enforcing in any respect whatsoever the Deputy Postmaster General's final order No. 55656 dated June 11, 1954.

Dated: August 13, 1954.

/s/ PEIRSON M. HALL,
Judge.

Approved as to Form:

.....,
Attorneys for Defendants.

/s/ STANLEY FLEISHMAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

Lodged August 5, 1954.

[Endorsed]: Filed and entered August 13, [102] 1954.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Otto K. Olesen, individually and as Postmaster of the City of Los Angeles, State of California, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order Granting Preliminary Injunction made and entered in this matter by the United States District Court,

Honorable Peirson M. Hall, Judge presiding, on
August 13, 1954.

Dated: August 16, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney;

/s/ JOSEPH D. MULLENDER, JR.,
Attorneys for Defendant,
Otto K. Olesen.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 16, 1954. [104]

In the United States Court of Appeals
for the Ninth Circuit

C.C.A. No. 14546

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, et al.,

Appellants,

vs.

V. E. STANARD, Individually and d/b/a MALE
MERCHANDISE MART,

Appellee.

ORDER TO STAY ORDER GRANTING PRE-
LIMINARY INJUNCTION PENDING AP-
PEAL

Good cause appearing therefor, It Is Hereby Ordered, Adjudged and Decreed that the Order Granting a Preliminary Injunction, made and entered in the District Court of the United States for the Southern District of California on August 13, 1954, in action No. 16866-PH, entitled V. E. Stanard, et al., vs. Otto K. Olesen, et al., be and the same is hereby stayed pending appeal from said Order Granting a Preliminary Injunction, or until further order of this Court, as follows:

So much of said Order as provides that during the pendency of the District Court action the defendant, Otto K. Olesen, and his agents, servants and employees are ordered to turn over and deliver to plaintiff, V. E. Stanard, all mail matter directed

to Male Merchandise Mart which was in their possession or custody or under their control on August 13, 1954, is hereby stayed;

So much thereof as enjoined the defendant, Otto K. Olesen, and his agents, servants and employees from enforcing in any respect whatsoever the impound order of the Deputy Postmaster General dated March 1, 1954, impounding plaintiff's mail is hereby stayed;

So much thereof as ordered that during the pendency of the District Court action the defendant, Otto K. Olesen, and his agents, servants and employees were enjoined from enforcing in any respect whatsoever the Deputy Postmaster General's final order No. 55656 dated June 11, 1954, insofar as it purported to enjoin the impounding of mail received prior to August 13, 1954, is hereby stayed.

Dated: August 16th, 1954.

/s/ ALBERT LEE STEPHENS,
U. S. Circuit Judge.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 110, inclusive, contain the orig-

inal Complaint; Order to Show Cause; Order; Reply to Order to Show Cause; Affidavit of Stanley Fleishman; Order for Judgment; Findings of Fact and Conclusions of Law; Order Granting Preliminary Injunction; Notice of Appeal; Designation of Record on Appeal and Stipulation and Order Extending Time to Docket Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of October, A.D. 1954.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14546. United States Court of Appeals for the Ninth Circuit. Otto K. Olesen, Individually and as Postmaster of the City of Los Angeles, State of California, Appellant, vs. V. E. Stanard, Individually and d/b/a Male Merchandise Mart, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth District

C.C.A. No. 14546

OTTO K. OLESEN, as Postmaster of the City of
Los Angeles, State of California, et al.,

Appellants,

vs.

V. E. STANARD, Individually and d/b/a MALE
MERCHANDISE MART,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant intends to rely on the following points
on Appeal of the above-entitled cause:

The District Court of the United States for the
Southern District of California, Central Division,
erred in granting a preliminary injunction for the
appellee, and against the appellant herein, for the
following reasons:

(a) The impound order of the Postmaster Gen-
eral, dated March 1, 1954, is not a final order.

(b) The Postmaster General has authority to
impound mail prior to hearing.

(c) The final order of the Postmaster General,
dated June 11, 1954, is a valid order because sup-
ported by substantial evidence.

(d) The statute (39 U.S.C.A. 259(A)), which authorized the Postmaster General to make the impound order of March 1, 1954, and the final order of June 11, 1954, is constitutional.

Dated: October 14, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney, Attorneys for Appellant,
Otto K. Olesen.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 15, 1954.